

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LEE J. POINDEXTER,

Defendant-Appellant.

UNPUBLISHED
November 3, 2005

No. 256447
Oakland Circuit Court
LC No. 03-193098-FH

Before: Cooper, P.J., and Fort Hood and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions by a jury of felon in possession of a firearm, MCL 750.224f, possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, and carrying a concealed weapon (CCW), MCL 750.227. He was sentenced as a fourth habitual offender, MCL 769.12, to two years in prison on the felony-firearm conviction and to two to fifteen years in prison on the felon in possession and CCW convictions. We affirm.

I

Defendant first argues that his constitutional right to be free from double jeopardy was violated because he suffered multiple punishments for the same offense in the form of three convictions: felon in possession of a firearm, felony-firearm, and CCW. He contends that this violated double jeopardy protections under both the Michigan and United States Constitutions because the prosecution in this case relied upon the violation of a single social norm and the “same utterance of words” for all three convictions. Since this issue was unpreserved at trial, this Court reviews this issue for plain error. *People v Meshell*, 265 Mich App 616, 628; 696 NW2d 754 (2005).

Whether the Legislature intended multiple punishments is the determining factor under both the federal and state double jeopardy clauses. *People v Denio*, 454 Mich 691, 706; 564 NW2d 13 (1997). For federal constitutional purposes, to determine whether the Legislature intended to allow multiple punishments for the same offense, we ordinarily must consider the

federal *Blockburger*¹ test. However, this Court has held that “where, as here, the Legislature specifically authorizes cumulative punishment, the *Blockburger* test has no application.” *People v Dillard*, 246 Mich App 163, 166; 631 NW2d 755 (2001).

The language of the felony-firearm statute makes it “clear that the Legislature intended, with only a few narrow exceptions, that every felony committed by a person possessing a firearm result in a felony-firearm conviction.” *Id.* at 167. The offenses enumerated as excepted from the felony-firearm statute are: unlawful sale of firearms, MCL 750.223, carrying a concealed weapon, MCL 750.227, unlawful possession of a firearm by a licensee, MCL 750.227a, and alteration of identifying marks on a firearm, MCL 750.230.

Since felon in possession of a firearm is not one of the excepted offenses listed in the statute, this Court has held that the Legislature intended to allow a defendant charged with felon in possession to also be charged with felony-firearm based on the same act. *Dillard, supra* at 167-168. The statutes strive to achieve different ends and to deal with the violation of two distinct social norms. “[T]he felon in possession statute aims to protect the public from guns in the hands of convicted felons.” *Id.* at 169. In contrast, “[t]he Legislature intended the felony-firearm statute to reduce the possibility of injury to victims, passersby, and police officers posed by a criminal’s utilization of a firearm and to deter the underlying felony itself.” *Id.* Further, convictions of CCW and felony-firearm in the same case do not violate double jeopardy protections so long as the felony-firearm conviction does not arise from the CCW charge. *Id.* at 170. In this case, the felony-firearm conviction was predicated on the felon in possession of a firearm charge. Accordingly, defendant has not established that any double jeopardy violation occurred, let alone plainly occurred, in this case.

II

Defendant also argues that the prosecution referred to his status as a convicted felon five times during trial, which was so prejudicial that it constituted a denial of his due process rights under the Fifth and Fourteenth Amendments. He also maintains that trial counsel should have moved to disjoin the felon in possession of a firearm charge in order to prevent defendant’s status from reaching the jury on the other counts.

Defendant failed to preserve this issue for appellate review at several junctures. First, defendant’s status as a convicted felon was entered by stipulation of the parties, effectively waiving his right to review of the matter. A party cannot stipulate to a matter and then argue on appeal that the resultant action was error. *People v Aldrich*, 246 Mich App 101, 111; 631 NW2d 67 (2001). A waiver of a known right serves to extinguish the error. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000). Second, defense counsel did not timely object to the prosecution’s references to defendant’s status as a convicted felon, despite the fact that to preserve most issues, a party must object below. *Id.* at 214. Third, an objection to evidence or

¹ *Blockburger v US*, 284 US 299, 304; 52 S Ct 180; 76 L Ed 306 (1932) (stating “where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not.”).

argument should typically be coupled with a curative instruction, which was not provided in this case. See *People v Harris*, 158 Mich App 463, 466; 404 NW2d 779 (1987). Regardless, we conclude that defendant has not established any error with regard to this issue.

Defendant argues that he was denied a fair trial because his status as a convicted felon was entered into evidence by stipulation of the parties. He essentially claims that “it was impossible for him to obtain a fair trial where, incident to the felon-in-possession prosecution, the jury was presented with evidence that defendant was *already* a felon.” See *People v Mayfield*, 221 Mich App 656, 658; 562 NW2d 272 (1997) (emphasis in original). However, defense counsel did not move to sever the felon in possession charge. Instead, he explicitly agreed to certain “safeguards” to protect defendant from prejudice, which has become a common practice with such offenses. This Court finds that a stipulation was appropriate in this case because to sever the felon in possession charge would have involved the admission of the same evidence in two trials since the prosecutions arose from the same transaction. It was therefore preferable to protect defendant against prejudice in a single trial and to act in the interest of judicial economy by using these safeguards. *Id.* at 660.

In this case, several safeguards were put in place to avoid prejudice to defendant. First, defendant’s status as a convicted felon was entered by stipulation of the parties at the outset of trial. In addition, the parties agreed that the nature of defendant’s prior felony convictions would not be admitted. Both sides adhered to this agreement. Second, the trial court provided the jury with a limiting instruction stating that it did not have to find the stipulated facts to be true.

Defendant also argues that the prosecution’s references to his status as a convicted felon were gratuitous, or beyond the scope of the stipulation, and therefore, prejudicial. This argument sounds of prosecutorial misconduct. Prosecutorial misconduct claims are reviewed “on a case-by-case basis by examining the record and evaluating the remarks in context, and in light of defendant’s arguments.” *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). Since the stipulation properly entered defendant’s status into evidence and since the prosecutor did not tread outside the limits of that stipulation, we consider his brief references to defendant’s status as a convicted felon to be reasonable. Further, the prosecution is permitted to argue the evidence and all reasonable inferences arising from it as they relate to the prosecution’s theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). The prosecution bore the burden of proving beyond a reasonable doubt that defendant was guilty of felon in possession, which required proof of the second element of that crime: that he had a prior felony conviction. Therefore, use of the stipulated facts was requisite to the prosecutor’s case and, therefore, permissible.

This Court has held that when a defendant agrees to stipulate to an unspecified prior felony and the jury is so instructed without objection, then he cannot subsequently assign error on appeal based on prejudice possibly arising from the existence of the felon in possession of a firearm charge. *People v Green*, 228 Mich App 684, 691; 580 NW2d 444 (1998). “To do so would allow a defendant to harbor error as an appellate parachute.” *Id.* Accordingly, we conclude that defendant is not entitled to relief based on this issue.

III

Defendant next argues that he was denied effective assistance of counsel when his trial attorney failed to object to the prosecution's gratuitous mention of his status as a convicted felon and/or to seek a mistrial and when he failed to move for severance of the felon in possession of a firearm charge. Defendant claims that his trial counsel's deficient performance prejudiced the defense such that he did not receive a fair trial. Because defendant did not raise this issue below, review is limited to errors of counsel on the record. See *People v Johnson*, 144 Mich App 125, 129-130; 373 NW2d 263 (1985).

When analyzing claims of ineffective assistance of counsel, effective assistance is presumed and the defendant bears the heavy burden of proving the contrary. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). Defendant must establish that (1) counsel's performance was below an objective standard of reasonableness under prevailing professional norms, without the benefit of hindsight; (2) there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different, and (3) the resultant proceedings were fundamentally unfair or unreliable. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

Defendant has not overcome the presumption that defense counsel's actions were part of a reasonable trial strategy. Defense counsel's failure to object to the prosecutor's references to defendant's convicted felon status was not objectively unreasonable. The prosecutor was within the limits of the stipulation when he briefly mentioned defendant's convicted felon status during opening statement and closing argument. He never mentioned the nature of defendant's prior felonies, as agreed by the parties, and the jury was correctly instructed as to how the stipulation should be treated. Defense counsel may have risked jury disapproval, or overruling, if he had objected to the prosecutor's references despite the fact that he had agreed to the terms of the stipulation.

As for defendant's claim regarding severance of the felon in possession charge, MCR 6.120(b) states that two related offenses may be tried together.² Therefore, a motion to sever would not have guaranteed two separate trials for defendant. On the contrary, Michigan law indicates that such a decision would be disfavored. This Court has stated that the severance of a defendant's felon in possession charge for the purpose of preventing his status as a convicted felon from reaching the jury and affecting the verdict on other, related charges is unnecessary and would cause a squandering of judicial resources. *Mayfield, supra* at 659. In addition, the felony-firearm charge was based upon the felon in possession of a firearm count, so there was no way to prove the former without the introduction of evidence regarding the latter, making a severance fruitless as to both of those charges. Accordingly, we believe that it is overwhelmingly probable that the trial court would have not granted a severance, even if counsel had moved for one. Defendant has not overcome the presumption that he received the effective assistance of counsel.

² MCR 6.120(b)(1) states, "Joinder is appropriate if the offenses are related. For the purposes of this rule, offenses are related if they are based on (a) the same conduct or transaction, or (b) a series of connected acts, or (c) a series of acts constituting parts of a single scheme or plan."

IV

Defendant also argues that the evidence in this case does not satisfy the “beyond a reasonable doubt” standard for the following reasons: (1) one of the police officers testified that defendant was not the type of operator who typically carries a gun; (2) there were no fingerprints on the gun; (3) the quality of the audio tape that was admitted into evidence was very poor; and (4) it was possible, according to the officers, that defendant was moving around in the backseat of the car because he was attempting to push a jug of alcohol with his feet. Because defense counsel commingles his arguments based on his convictions being against the great weight of the evidence and there being insufficient evidence to support his convictions, we address these questions separately.

When a case is tried before a jury, failure to raise an objection by a motion for a new trial before the trial court forfeits the issue on appeal. *People v Winters*, 225 Mich App 718, 729; 571 NW2d 764 (1997). Upon review of defendant’s motion for a new trial in this case, we conclude that defendant’s great weight issue was not preserved.³ Thus, our review of this question is limited to whether there was plain error that affected defendant’s substantial rights. *People v Musser*, 259 Mich App 215, 218; 673 NW2d 800 (2003).

Defendant cites testimony by one of the arresting officers indicating that the officer never saw defendant actually possess the handgun, nor did he see him place anything in the armrest. However, as they approached the vehicle, the officers observed defendant, who was sitting in the backseat alone, making movements with his shoulder. The officers subsequently discovered a gun in the armrest of the backseat, and there was evidence that the audiotape in the patrol car recorded defendant stating that he put the gun in the armrest.

To show that a conviction was against the great weight of the evidence, a defendant must establish that the evidence “preponderates heavily” against the verdict. *People v Lemmon*, 456 Mich 625, 639, 642; 576 NW2d 129 (1998). This is a very difficult standard for a defendant to attain, but we are bound by the decisions of our Supreme Court and therefore must determine whether defendant has met our Supreme Court’s stringent burden in this case. At the outset, we note that the basis for defendant’s claim that his conviction is against the great weight of evidence is his contention that the jury should not have ruled against him on most of the factual disputes presented at trial. Hence, defendant has failed to effectively raise a valid claim under the “great weight of the evidence” theory. However, considering the evidence as a whole, we note that the circumstantial evidence of defendant’s possession of the gun was such that the evidence did not heavily preponderate against the verdict. Possession may be constructive. *People v Burgenmeyer*, 461 Mich 431, 438; 606 NW2d 645 (2000). “A person has constructive possession if there is proximity to the article together with indicia of control. . . . [A] defendant has constructive possession of a firearm if the location of the weapon is known and it is

³ Defendant’s fourth issue in his motion for a new trial is that the evidence failed to support a finding of guilt beyond a reasonable doubt. The motion does not, at any point, reference the great weight of the evidence standard. In addition, the transcript of the motion hearing does not reflect an argument regarding a verdict against the great weight of the evidence.

reasonably accessible to the defendant.” *Id.* It was reasonable for the jury to determine that defendant had possession of the weapon since he had both close physical proximity to it and, based on the tape, admitted placing the weapon in the armrest. Thus, defendant’s convictions were not against the great weight of the evidence and certainly were not plainly so.

Defendant also contends that there was insufficient evidence that he possessed the gun at issue to support his convictions. In considering such a claim, we review the evidence de novo in the light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005).

Circumstantial evidence and reasonable inferences arising from the evidence can constitute satisfactory proof of the elements of the crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). Again, defendant’s claim is based more on the theory that the jury should have found in his favor than a legitimate argument that there was insufficient evidence to sustain his conviction. The evidence in this case was sufficient for the jury to have found that defendant possessed the gun at issue. Defendant’s movements as the officers approached the vehicle, the location of the gun in the armrest, and the audio recording provided reasonable grounds for the jury to infer that defendant possessed the gun.

Affirmed.

/s/ Jessica R. Cooper
/s/ Karen M. Fort Hood
/s/ Stephen L. Borrello